FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-37.

SUSAN LYNN VORCHHEIMER, by Her Parents BERT and CAROL VORCHHEIMER, Guardians Ad Litem, on Her Own Behalf and on Behalf of All Others Similarly Situated,

Petitioners,

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR THE PETITIONERS.

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INDEX TO BRIEF.

	Page
I. INTRODUCTION	1
II. ARGUMENT	3
A. The Equal Protection Analysis Set Forth in *Reed v. Reed* and Its Progeny Is Applicable to This Case	3
B. Exclusion From Central High School Denies Academically Gifted Female Students Educational Opportunity Equal to That Afforded to Similarly Situated Male Students	5
C. Remand Is Not Appropriate	7
D. The Single Sex Character of Central High School Is Not Substantially Related to Any Important Objective of the School District	8
E. This Court Need Not Reach the Statutory Argument in This Case	13
III. CONCLUSION	14
EXHIBIT A	15

TABLE OF CITATIONS.

Cases:	Page
Brown v. Board of Education, 347 U. S. 483 (1954)	4
Craig v. Boren, 97 S. Ct. 451 (1976)	1, 3, 5, 8
Epperson v. Arkansas, 393 U. S. 97 (1968)	12
Frontiero v. Richardson, 411 U. S. 677 (1973)	10
Goesaert v. Cleary, 335 U. S. 464 (1948)	3
Matthews v. Lucas, 96 S. Ct. 2755	10
McGowan v. Maryland, 366 U. S. 420 (1961)	12
McLaurin v. Oklahoma State Regents for Higher Education, 339 U. S. 637 (1950)	6, 7, 8
Plessy v. Ferguson, 163 U. S. 537 (1896)	4
Reed v. Reed, 404 U. S. 71 (1971)	1, 3, 5
San Antonio Independent School District v. Rodriguez, 411 U. S. 1 (1973)	12
Shelly v. Kraemer, 334 U. S. 1 (1948)	4
Sweat v. Painter, 339 U. S. 629 (1950)	6, 7, 8
Weinberger v. Weisenfeld, 420 U. S. 636 (1975)	11
Williams v. McNair, 401 U. S. 951 (1971) affirming 316 F. Supp. 134 (D. S. C., 1970)	3
Statute:	
Equal Educational Opportunities Act of 1974	2, 3, 7, 8, 13
Miscellaneous:	
III Dale Mixed or Single Sex Schools	9

I. INTRODUCTION.

This case is not a generalized challenge of sex segregated public education. The only question presented here is whether Central High School of Philadelphia may continue to deny admission to otherwise qualified female students solely on the basis of their gender. A decree admitting petitioners to Central—the most distinguished educational facility in the Philadelphia Public School System—would in no way preclude the School District from continuing to operate other single sex schools.

Since *Reed v. Reed*, 404 U. S. 71 (1971), this Court has consistently held that classifications based upon sex violate the Equal Protection Clause unless they are proven to be substantially related to the achievement of important governmental objectives. See *Craig v. Boren*, 97 S. Ct. 451, 457 (1976). The trial court below applied this test and, after identifying the School District's stated objectives and examining the proffered justifications with reference to their application to Central High School, found that the exclusion of female students from that institution was not fairly and substantially related to any of the Respondents' legitimate goals.[1] This Court need go no further to vindicate the constitutional rights asserted here.

Central High School is unique because it is the premier school in the Philadelphia public school system, with the richest history and the highest reputation. Central and its all-female sister institution, The Philadelphia High School for Girls, are the only academic high schools in the School District. The trial court found that the education available at other high schools is not as well suited to the needs of the students who qualify for admission to the

1. The court of appeals did not overturn any of these findings. Instead, it's decision obscured the particulars of this case, addressing instead the question of whether "every public school . . . in the Nation [must] be coeducational." (Pet. 2a).

academic schools. Consequently, these students are offered a coeducational alternative only to the extent that they are willing to forego significant educational benefits.

Central's high academic qualifications for admission define its student body, and members of the Plaintiff class,[2] as potential leaders in all fields in which educational achievement is a factor. Young men and women who meet these criteria of excellence and share the same career aspirations are denied an important educational benefit by being deprived of the opportunity to engage in the free exchange of ideas within the classroom setting. It is the young women, however, who suffer the most from the Respondents' policy of segregating its superior students on the basis of sex. Exclusion from the only truly elite public educational institution, which is preserved for members of the dominant class, necessarily impedes their opportunity to enter into the mainstream of the economic and political life of the community.

For all of these reasons, the exclusion of female students from Central High School represents the clearest and most compelling situation in which classification on the basis of sex fails to meet the requirements of the Equal Protection Clause.

2. Only 7% of the students in the School District meet the qualifications for admission to the academic high schools. This case is maintained as a class action on behalf of "all those females who otherwise meet the admission standards of Central High School, who have been, are, or will be denied admission to Central because of their sex." Pet. 55a.

II. ARGUMENT.

A. The Equal Protection Analysis Set Forth in Reed v. Reed and Its Progeny Is Applicable to This Case.

In *Craig v. Boren, supra,* this Court's most recent decision regarding application of the Equal Protection Clause to gender based classifications, the Opinion of the Court summarizes the current state of the law as follows:

> Analysis may appropriately begin with the reminder that *Reed v. Reed, supra,* emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." . . . To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives, and must be substantially related to achievement of those objectives. (at 457)

Respondents contend that the separation of the sexes in public schools is exempt from scrutiny, or requires only a minimal level of justification, as long as substantially equal educational programs are provided for both males and females.[3] Their theory, as articulated by the majority of the court of appeals below, holds that: "If there are

3. In support of this analysis Respondents place great reliance upon the per curiam affirmance in *Williams v. McNair,* 401 U. S. 951 (1971), affirming 316 F. Supp. 134 (D. S. C., 1970). *Williams* is distinguishable from the present case because it does not involve exclusion of females from an institution maintained for the dominant (male) gender, (see Petitioners' Brief p. 30-32; cf Stevens concurring and Renquist dissenting in *Craig, supra*), and because the court there found that the state college system provided equal educational opportunity at other schools on a co-educational basis. In addition, the three-judge court in *Williams* applied the permissive rational basis test in reliance upon *Goesaert v. Cleary* (335 U. S. 464) a 1948 decision disapproved in *Craig, supra.* See fn 23 at p. 463.

benefits or detriments inherent in the system, they fall on both sexes in equal measure." (Pet. 14a).[4] The obvious response to this argument is, as this Court stated in *Shelly v. Kraemer,* 334 U. S. 1 at 22 (1948): "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Moreover, the observation that members of both genders are afforded the same treatment in being separated from each other, does not establish that the effect is the same upon both groups.

Public education is not the first, but rather the last, area of state regulated activity in which arbitrary discrimination should be countenanced. As this Court recognized in the landmark decision of *Brown v. Board of Education:*

> Today, education is perhaps the most important function of state and local governments. . . . In these days it is doubtful that any child may be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. . . . (347 U. S. 483 at 493 (1954))
>
> We conclude that in the field of public education the doctrine of separate but equal has no place. (id at 495)

Petitioners do not contend that gender based classifications in education are totally analogous to those based upon race. There may, indeed, be situations in which sex is a permissible basis for difference in treatment within a public school program. We assert only that such classifications are not presumptively valid, but must meet the standard

4. Judge Gibbons, in his dissenting opinion in the court of appeals, accurately characterized this "equal benefit" rationale as the "twentieth century sexual equivalent" of *Plessy v. Ferguson,* 163 U. S. 537 (1896). Pet. 17-18a.

of scrutiny set forth in *Reed, supra,* and developed in *Craig, supra,* and the intervening cases.

B. Exclusion From Central High School Denies Academically Gifted Female Students Educational Opportunity Equal to That Afforded to Similarly Situated Male Students.

Respondents contend that members of the Plaintiff class are afforded educational opportunity equal to that available at Central High School either at Girl's High School, in a single-sex environment, or at their neighborhood comprehensive high school, in a co-educational setting. Their assertion that the education available at the neighborhood schools is equivalent to that provided at Central is contradicted by the explicit finding of the trial court that:

> Central and Girls' offer their students an experience which is more intensely intellectual and a better prepartion for the atmosphere of a good liberal arts college than is offered by any of the non-academic high schools. (Finding 51)

This finding was not disturbed by the court of appeals. It is confirmed not only by the experience of Petitioner Susan Vorchheimer in attending George Washington, one of the most highly rated neighborhood schools, but also by the testimony of one of the Respondent's own witnesses, Dr. Ruth Kline, who stated that the academic high schools provide the education best suited to the needs of the students who meet their admission requirements (NT 239-40).

The only high school which is in any way comparable to Central is the Philadelphia High School for Girls, the corresponding academic high school with an all-female ad-

mission policy. The district court, after excluding from consideration all of Central's advantages which did not have a direct bearing upon the level of class-room instruction [5] found "the education available to the female students at Girls is comparable to that available to male students at Central" (Finding 30). But, as is noted in the Memorandum of the United States as *amicus curiae* filed by the former Solicitor General (pp. 22-23) "the district court also recognized that very real differences exist between the two schools. The findings of fact, none of which have been disturbed by the court of appeals, establish that Central High School has superior science facilities, a more extensive library, a more prominent body of graduates, an enhanced reputation, and a greater endowment." [6] Central, unlike any other school in the Philadelphia public school system, exemplifies all of those characteristics which this Court in *Sweat v. Painter*, 339 U. S. 629 (1950), identified as making for greatness in an education institution. In addition to establishing the importance of these intangible factors, the Court in *Sweat*, and in its companion case, *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U. S. 637 (1950), recognized that the "free exchange of ideas" with members of the dominant class is an essential part of the preparation for a leadership role in

5. The Court noted that Central is the only high school with a substantial private endowment, the Barnwell Foundation, and that this fund was responsible for bringing to school functions such notable political leaders as then Attorney General Robert Kennedy and then Vice President Hubert Humphrey. However, these advantages were specifically excluded from the limited definition of education utilized for purposes of Finding 30.

6. The memorandum describes at length differences between the schools found by the trial court. Other evidence of the differences between the two schools not specifically noted in the district court opinion are Central's ability to attract a higher percentage of the most talented students and its lower teacher absence rate. See Exhibit A of this Brief.

society.[7] All of these factors are legally relevant in determining whether the exclusion of females from Central High on the basis of their sex denies the Plaintiff class a significant public benefit in violation of the Equal Protection Clause.[8]

C. Remand Is Not Appropriate.

The Memorandum filed by the United States as *amicus curiae*, makes careful inventory of the "very real differences" between Central, from which Susan Lynn Vorchheimer and her class have been excluded because they are female, and Girls High, to which respondents have sought to remit them. Memorandum for the United States as *amicus curiae*, pp. 23-5.

But, after documenting the acknowledged "disparities" (*id.* at p. 28)—in, e.g., facilities, character of diploma, endowment, prestige—between these institutions, the Memorandum then urges remand for inquiry into whether these disparities have an impact with respect to subsequent opportunities for educational and professional advancement.

With all respect, petitioners regard the proposed inquiry as quixotic. It is hard to perceive just how a federal district court might reasonably determine whether, for example, "professional opportunities would likely be any different for two women with identical college and graduate school records at the same university and identical

7. Central's selective admission criteria have been utilized for generations to identify its students as potential leaders "in industry and in life." See Petitioners' Brief p. 15 fn 8. Female students who meet these qualifications except as to sex, like the Plaintiffs in *Sweat* and *McLaurin*, are potential leaders and members of an emerging group who can not fulfill their potential in isolation.

8. Respondent's contention that *Sweat* and *McLaurin* are applicable only to race discrimination is without merit. See Memorandum of United States as *amicus curiae* pp. 26-28.

high school records, if one were a graduate of Girls and the other a graduate of Central." *Ibid.* The proposition that graduation from a uniquely prestigious institution tends to carry with it a special momentum for success would seem to be one of those issues on which a page of history would be worth a volume of remand. In any event, this Court did not find it necessary in *Sweat v. Painter, supra* to remand for findings on whether a black graduate of (the Jim Crow) Texas State University Law School would in fact be professionally disadvantaged as against a black graduate of the University of Texas Law School.

On an analytical level, the recommendation of the Solicitor General is also disturbing, since it suggests that the protection of the Fourteenth Amendment is limited to economic deprivations. On the contrary, this Court's decisions in both *Sweat* and *McLaurin* make it clear that education, even apart from its economic rewards, is a significant interest within the purview of the Equal Protection Clause. Indeed, it seems particularly unlikely that this Court, only a few months after holding that the opportunity to drink 3.2 beer could not be limited on the basis of gender, would afford less protection to educational opportunity.

D. The Single Sex Character of Central High School Is Not Substantially Related to Any Important Objective of the School District.

Craig v. Boren, supra, teaches that a sex-based classification can not be sustained by overbroad generalizations, even where there is a significant correlation between gender and the characteristic which it is purported to represent. Where statistical studies are employed, their conclusions must be decisively and unimpeachably supported by the research, and the relevance of the subject of the study to the purpose of the classification must be manifest. In addition, data which is merely descriptive of

the effects of present or past discrimination may not be utilized to justify policies which promote or reinforce "old notions" of sex appropriate behavior.

At trial, the Respondents attempted to demonstrate that sex segregation is educationally beneficial for high school students. Their proof falls into two categories: its effect upon females and upon males. Their effort to establish that single sex education is beneficial for girls fails to address the overbreadth of the classification challenged here. None of the authorities relied upon even suggest that all female high school students share the characteristics which, arguably, make the coeducational setting less conducive to academic progress. Consequently, this rationale may not be invoked to exclude those females who would benefit from the opportunity to attend Central High School.

The Respondents also failed to demonstrate that the male students at Central would be injured by the introduction of females into Central's student body. The Jones-Shallcross-Dennis study (D-1) introduced by the testimony of Dr. Jones, identified only minimal attitudinal differences between the male students at the New Zealand single-sex and co-educational high schools which were the subject of the study. The trial court found that this study failed to justify the exclusion of female students from Central High because (1) its findings did not appear to be applicable to a high school for superior students, and (2) it did not demonstrate that the gender composition of a school resulted in higher educational achievement (Pet. 56a). In fact, studies which measured academic achievement directly have found that boys make better progress, particularly in mathematics, in co-educational schools. See III Dale *Mixed or Single Sex Schools?* 266.

In their Brief in this Court, the Respondents abjure any claim that sexually segregated education is superior

to co-education (at p. 29).[9] They limit their endorsement of single-sex education to the assertion that it is a "reasonable" educational methodology, which they base primarily upon the stipulation that it has a "long history and world wide acceptance" and is regarded by some educators as a "reasonable and natural approach". (Findings 32 & 33).[10] The long history and wide acceptance of single-sex education, considered in the context of the "long and unfortunate history of sex discrimination" which this Court has acknowledged (see *Frontiero v. Richardson,* 411 U. S. 677 at 680 (1973)), tends to cast even greater doubt upon its legitimacy. As Justice Stevens has pointed out:

> [A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female . . . . But that type of stereotyped reaction may have no rational relationship—other than purely prejudicial discrimination—to the stated purpose for which the classification is being made. (*Matthews v. Lucas,* 96 S. Ct. 2755 at 2769, Stevens, J, dissenting).

Moreover, while Petitioners acknowledge that some educators favor single-sex education, the existence of this body of opinion does not establish that sex-segregation is in any way related to the achievement of the School District's stated objectives. The Respondents objectives do not include socializing students to conform to sex-appropriate patterns of behavior, which appears to be a major

9. Such a contention would put the School District in an anomalous position, in view of the co-educational nature of most of its high schools.

10. Petitioners did not stipulate that single sex education is "reasonable", as Respondents suggest at p. 29-30 of their Brief.

concern of the advocates of single sex education (See Brief of Petitioners p. 35-36 and fn. 34).

The Respondents argue that they are entitled to continue to maintain Central as an all-male institution in the interest of providing an alternative for the students and parents who prefer single-sex education. In assessing this asserted justification, it is not necessary to determine whether a single sex alternative may ever be permissible in an otherwise sexually integrated school system. In this case it is clear that fostering "freedom of choice" is not the real purpose for excluding female students from Central High School and consequently will not sustain this practice. See *Weinberger v. Weisenfeld,* 420 U. S. 636 (1975).[11]

As the district court observed, single sex education is the only choice available at the academic high school level (Pet. 85a). The record in this case also contradicts the School District's assertion that there is a demand for this form of education. On the contrary, the data introduced at the trial regarding school population statistics shows that the only high schools in the Philadelphia public school system which were not overcrowded were five of the six high schools which were single sex during the 1973-74 school year. See Exhibit A of this Brief. Two of these schools, William Penn (previously all-female) and Benjamin Franklin (previously all-male), were converted into co-educational high schools while this suit was pending. If Central were to accept female students, those male students who prefer an all-male learning environment could attend Thomas Edison, which is presently under capacity in enrollment. Edison enjoys the additional advantage of being a comprehensive high school. Consequently, it does

11. The original purpose of excluding females from Central when no other public high school existed, clearly arose from a bias against women's intellectual ability and need for formal education.

not limit the availability of single sex education to students who exhibit a characteristic (high academic performance) which has not been shown to be related to their need or preference for this type of school.

Finally, the Respondents contend that this Court must defer to the school board's determination in all matters effecting educational policy. Their reliance upon *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1 (1973), in support of this proposition is misplaced. In that case this Court merely recognized that the opportunity for local input in decisions regarding education represents a reasonable basis for drawing school district lines on a local basis. The opinion does not suggest that the decisions of a local school board are exempt from review where constitutional rights are at stake. *Epperson v. Arkansas*, 393 U. S. 97 (1968), also cited by Respondents, actually represents the contrary result.

The decision of a local school board, while it may be entitled to some respect, does not rise to the stature of a state statute, *cf. McGowan v. Maryland*, 366 U. S. 420 (1961).[12] In this particular case, it is doubtful that the school board's decision to oppose the admission of female students to Central High School even represents a valid expression of public opinion on the subject. In view of the low demand for sex segregated education reflected in the underenrollment at the single-sex schools (see p. 11 *supra*) and the influence of the Central High School Alumni Society, as found by the district court (Finding 21), it would appear more likely that the board's decision is only one more indication of the political clout of Central's alumni.[13]

12. Both *Rodriguez* and *Epperson* involved state statutes.

13. The Central High School Alumni Society appeared as *amicus curiae* on behalf of the School Board in the district court.

E. This Court Need Not Reach the Statutory Argument in This Case.

Petitioners defer to the United States in its interpretation of the provisions of the Equal Educational Opportunities Act of 1974. In its Memorandum as *amicus curiae* (pp. 12-21), the United States argues that the provisions of that Act are applicable to the present case, but that "the Act should not be construed, at least in the present context of special system-wide schools . . . as intended to prohibit sex segregation that does not independently constitute a denial of equal protection of the laws . . . wtihin the meaning of Section 1 of the Fourteenth Amendment." (id. at p. 18).

Petitioners believe that it may be inappropriate for this Court to rule upon the statutory argument in the present case. The argument of the United States is not without its difficulties. Cf. Gibbons, J., dissenting below (Pet. 27a-31a). Moreover, its construction of the Act does not avoid the constitutional issue.

The only construction of the Equal Educational Opportunities Act of 1974 which would avoid the constitutional question, is one which would find in the statute an absolute prohibition of sex based admission standards in public schools. This result is far broader than the relief requested by Petitioners.

The Court is not presented here with a difficult question of constitutional law which can be avoided by statutory construction. Rather, this is a case which calls only for the application of now settled principals of constitutional law. The statutory argument is both more difficult and broader in its impact. Consequently, the rule of decision which generally calls for disposing of the statutory claim before reaching the constitutional question is not applicable.

III. CONCLUSION.

Petitioners contend that so long as the School District of Philadelphia maintains a school which not only in name but in historical and present fact is the Central High School, petitioners are constitutionally entitled not to be barred from the benefits of that public institution because they are female. The judgment below should be reversed.

Respectfully submitted,

SHARON K. WALLIS,
Attorney for Petitioner.

Exhibit A

	Page in P-12	Capacity	Enrollment	Pupil Enrollment: % Average Attendance	% Black	% Sp. S.	% Low Income	Staff: % Black	Rate of Absence	Reading: Percent Pupils Scoring: Below 16th %ile	16th thru 49th %ile	50th thru 84th %ile	85th and above %ile
BARTRAM	3	3165	4300	75	77		37	23	6.9	45	39	14	2
WEST PHILADELPHIA	3	2789	2894	69	99+		38	41	7.8	57	33	9	1
UNIVERSITY CITY	3	2931	2958	75	99		49	37	8.3	52	35	11	2
FRANKLIN °	6	1961	1490	61	96		65	35	6.5	78	17	4	1
PARKWAY	6		867	82	69		28	49	5.5	26	42	22	10
PENN, WILLIAM °°	6	3500	2491	60	95		70	44	8.8	66	27	7	0
SOUTH PHILADELPHIA	9	2450	4043	6[illegible]	53		40	9	9.8	50	35	13	2
GRATZ	12	3077	3106	71	99+		52	46	8.7	72	23	5	0
OVERBROOK	12	2883	3415	78	99+		32	22	6.6	45	36	17	2
EDISON °	15	2010	1707	62	64	27	60	29	7.7	73	20	6	1
KENSINGTON °°	15	1019	1610	62	56	25	62	15	7.7	70	25	4	1
CENTRAL °	18	2085	1570	92	32		7	10	5.6	0	7	42	51
GERMANTOWN	18	3041	3216	71	99		33	31	7.3	50	37	12	
GIRLS °°	18	1849	1595	92	49		10	11	10.0	0	7	50	43
KING	18	2822	3164	75	98		36	37	6.7	47	41	11	1
ROXBOROUGH	18	2022	2253	80	21		20	8	7.7	23	43	27	7
FRANKFORD	21	2184	2827	78	10		13	11	4.7	26	41	27	6
OLNEY	21	3507	4509	72	61	7	25	10	6.9	46	40	13	1
LINCOLN	24	2734	3889	88	3		7	12	6.8	13	43	34	10
NORTHEAST	24	2738	3548	86	6		3	10	7.9	8	31	41	20
WASHINGTON	24	3941	4292	86	2		5	9	7.2	13	35	36	16

° All-Male School °° All-Female School

Source—Exhibit P-12, Oakes, *Statistical Analysis (School by School) of the Philadelphia Public Schools*, April, 1975.